

No. 48558-3-II

COURT OF APPEALS, DIVISION II  
STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

vs.

VAN DAMME ALEX BUTH,

Appellant.

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On Appeal from the Pierce County Superior Court  
Cause Nos. 14-1-04071-9 & 15-1-01469-4  
The Honorable Kitty Ann Van Doorninck, Judge

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OPENING BRIEF OF APPELLANT

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## **I. ASSIGNMENTS OF ERROR**

1. The trial court erred when it accepted Van Buth's guilty pleas without adequately determining whether he understood the nature of the charges to which he was pleading.
2. Any future request by the State for appellate costs should be denied.

## **II. ISSUES PERTAINING TO THE ASSIGNMENTS OF ERROR**

1. Where the crime of unlawful possession of a controlled substance with intent to deliver requires proof, beyond mere possession, that the defendant intended to deliver the substance to another person, and where the court failed to determine if Van Buth understood this requirement, did the trial court err when it found that Buth understood the nature of the charge and when it accepted Buth's guilty plea? (Assignment of Error 1)
2. Where a deadly weapon sentence enhancement requires proof of a nexus between the weapon and the crime, and where the court failed to determine if Van Buth understood this requirement, did the trial court err when it found that Buth understood the nature of the charge and when it accepted Buth's guilty plea? (Assignment of Error 1)

3. If the State substantially prevails on appeal and makes a request for costs, should this Court decline to impose appellate costs because Van Buth does not have the ability to pay costs, he has previously been found indigent, and there is no evidence of a change in his financial circumstances? (Assignment of Error 2)

### **III. STATEMENT OF THE CASE**

The State charged Van Damme Alex Buth under cause number 14-1-04071-9 with one count of unlawful possession of a controlled substance with intent to deliver while armed with a deadly weapon and one count of unlawful possession of a firearm (RCW 60.50.401, RCW 9.94A.530, RCW9.94A.533, and RCW 9.41.040). (14 CP 5-6)<sup>1</sup> The State also charged Buth under cause number 15-1-01469-4 with one count of unlawful possession of a controlled substance with intent to deliver (RCW 60.50.401). (15CP 71) Buth pleaded guilty to all three substantive charges and to the deadly weapon allegation. (14CP 11-20; 15CP 76-85; 10/08/15 RP 6-10)

Following a colloquy with Buth, the trial court found that Buth's

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<sup>1</sup> The clerk's papers for Superior Court cause number 14-1-04071-9 will be referred to as "14CP" and the clerk's papers for Superior Court cause number 15-1-01469-4 will be referred to as "15CP." The transcripts will be referred to by the date of the proceeding.

plea was made knowingly, intelligently and voluntarily, and the court accepted the guilty plea. (10/08/15 RP 10) Buth subsequently filed a motion to withdraw his guilty plea, asserting that his plea was involuntary because the prosecutor threatened him and because he was under stress from the recent death of his grandfather and felt pressured into making an immediate decision. (14CP 22-24; 15RP 87-89; 01/22/16 RP 3-4) The trial court denied Buth's motion. (01/22/16 RP 5)

The trial court imposed standard range concurrent sentences totaling 124 months, and imposed only mandatory legal financial obligations. (01/22/16 RP 8-9; 14CP 33-35; 15CP 97-99) This appeal timely follows. (14CP 42; 15CP 107)

#### **IV. ARGUMENT & AUTHORITIES**

- A. THE TRIAL COURT ERRED WHEN IT ACCEPTED BUTH'S GUILTY PLEAS WITHOUT ADEQUATELY DETERMINING WHETHER HE UNDERSTOOD THE NATURE OF THE CHARGES TO WHICH HE WAS PLEADING.

Washington's court rules set forth the requirements for the acceptance of a guilty plea:

The court shall not accept a plea of guilty, without first determining that it is made voluntarily, competently and with an understanding of the nature of the charge and the consequences of the plea. The court shall not enter a judgment upon a plea of guilty unless it is satisfied that there is a factual basis for the plea.

CrR 4.2(d) (emphasis added).

Thus, a guilty plea is invalid if it is made without “an understanding of the nature of the charge” CrR 4.2(d). And a guilty plea is not truly voluntary “unless the defendant possesses an understanding of the law in relation to the facts.” In re PRP of Keene, 95 Wn.2d 203, 209, 622 P.2d 360 (1980) (quoting McCarthy v. United States, 394 U.S. 459, 466, 89 S. Ct. 1166, 22 L. Ed. 2d 418 (1969)). “At a minimum, ‘the defendant would need to be aware of the acts and the requisite state of mind in which they must be performed to constitute a crime.’” State v. Osborne, 102 Wn.2d 87, 93, 684 P.2d 683 (1984) (quoting Keene, 95 Wn.2d at 207).

Due process also requires that a guilty plea be knowing, intelligent and voluntary. In re PRP of Hews, 108 Wn.2d 579, 590, 741 P.2d 983 (1987); Henderson v. Morgan, 426 U.S. 637, 644-45, 96 S. Ct. 2253, 49 L. Ed. 2d 108 (1976). “Due process requires that a defendant be apprised of the nature of the offense in order for a guilty plea to be accepted as knowing, intelligent, and voluntary. Real notice of the nature of the charge is ‘the first and most universally recognized requirement of due process.’” Osborne, 102 Wn.2d at 92-93 (quoting Henderson, 426 U.S. at 645).

For example, in State v. Powell, 29 Wn. App. 163, 627 P.2d 1337 (1981), this Court set aside the guilty plea of a defendant charged with first degree murder. There, the only factual basis made on the record at the time the plea was taken was the defendant's statement taken from his statement on plea of guilty pursuant to CrR 4.2. The defendant admitted, "I did participate in the 1 (degree) murder of Charles Allison." 29 Wn. App. at 165. This Court noted that during the colloquy between the trial judge and the defendant, no attempt was made to orally elicit a description of the defendant's acts or state of mind that resulted in the charge to which he pleaded. 29 Wn. App. at 167. In addition, the Court found the defendant's written statement to be a mere conclusion of law which failed to set forth any of the elements from which a jury could have found him guilty of first degree murder. 29 Wn. App. at 167.

Similarly, in this case, the record does not establish that Buth understood the nature of the crimes to which he pleaded guilty or the facts the State would have to prove for a jury to find him guilty. Under each cause number, the State alleged that Buth committed the crime of unlawful possession of a controlled substance with intent to deliver (14CP 5-6; 15CP 71), which requires proof that the defendant intended to deliver the substance to another person. RCW

69.50.401(a). But Washington case law forbids the inference of intent to deliver based on mere possession of a controlled substance, without more. See State v. Brown, 68 Wn. App. 480, 483, 843 P.2d 1098 (1993); State v. Campos, 100 Wn. App. 218, 222, 998 P.2d 893 (2001).

Furthermore, for one count of unlawful possession of a controlled substance with intent to deliver, Butth pleaded guilty to being armed with a deadly weapon during commission of the crime. (14CP 5-6, 19) To support a finding that a defendant was armed with a deadly weapon during the commission of a crime, there must be a nexus between the weapon and the crime. State v. O'Neal, 159 Wn.2d 500, 503-04, 150 P.3d 1121 (2007) (quoting State v. Schelin, 147 Wn.2d 562, 575-76, 55 P.3d 632 (2002)). A person is not armed simply because a weapon is present or on the premises during the commission of a crime. Schelin, 147 Wn.2d at 570 (the mere presence of a weapon is not sufficient to impose a firearm enhancement). When a crime is a continuing crime—like a drug possession or manufacturing operation—a nexus exists if the weapon was “there to be used,” which requires more than just the weapon’s presence at the crime scene. State v. Gurske, 155 Wn.2d 134, 138, 118 P.2d 333 (2005).

There is nothing in the record to show that Buth understood these requirements. When asked in his Statement of Defendant on Plea of Guilty to list what he did to make him guilty of the crimes, Buth simply writes:

On 10/9/14 in Pierce County, WA I unlawfully and feloniously possessed oxycodone, a controlled substance, while armed with a deadly weapon, with the intent to unlawfully deliver the oxycodone to another individual.

(14CP 19) And:

On 1/20/15 in Pierce County, WA I unlawfully and feloniously possessed oxycodone, a controlled substance, with the intent to unlawfully deliver the oxycodone to another individual.

(15CP 84)

At the hearing, the trial court did not inquire into whether Buth understood that there must be specific evidence of intent to deliver and a nexus between the weapon and the crime of possession of a controlled substance. The only discussion about the elements of the crimes occurred when trial counsel stated that he and Buth “have reviewed the elements of those crimes together,” and when the trial court reads Buth’s plea statement set forth above and asked “[i]s that a true statement?” (10/08/15 RP 4, 8-9) Buth answered with a simple “Yes.” (10/08/15 RP 9)

Neither the defense attorney, nor the prosecutor nor the judge recited any additional facts or explained the meaning of these elements. And neither the defense attorney, nor the prosecutor nor the judge mentioned the intent and nexus factual requirements.

Simply reciting the elements of the crime and asking if Buth understood the charges, and Buth's one word response, does not show that Buth truly understood the nature of the allegations, and the elements the State was required to establish before he could be convicted. See State v. S.M., 100 Wn. App. 401, 415, 996 P.2d 1111 (2000) (the defendant's "simple 'yes' response to the court's oral question about the meaning of sexual intercourse" is not adequate).

Accordingly, "the record does not affirmatively show that" Buth "understood the law in relation to the facts or entered the plea intelligently and voluntarily," and the trial court erred when it accepted Buth's guilty plea. S.M., 100 Wn. App. at 415.

B. ANY FUTURE REQUEST FOR APPELLATE COSTS SHOULD BE DENIED.<sup>2</sup>

Under RCW 10.73.160 and RAP Title 14, this Court may order a criminal defendant to pay the costs of an unsuccessful appeal.

RAP 14.2 provides, in relevant part:

A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

But imposition of costs is not automatic even if a party establishes that they were the “substantially prevailing party” on review. State v. Nolan, 141 Wn.2d 620, 628, 8 P.3d 300 (2000). In Nolan, our highest Court made it clear that the imposition of costs on appeal is “a matter of discretion for the appellate court,” which may “decline to order costs at all,” even if there is a “substantially prevailing party.” Nolan, 141 Wn.2d at 628.

In fact, the Nolan Court specifically rejected the idea that imposition of costs should occur in every case, regardless of whether the proponent meets the requirements of being the “substantially

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<sup>2</sup> Recently, in State v. Sinclair, Division 1 concluded “that it is appropriate for this court to consider the issue of appellate costs in a criminal case during the course of appellate review when the issue is raised in an appellant’s brief.” 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016). Jones is including an argument regarding appellate costs in his opening brief in the event that this Court agrees with Division 1’s interpretation of RAP 14.2.

prevailing party” on review. 141 Wn.2d at 628. Rather, the Court held that the authority to award costs of appeal “is permissive,” so that it is up to the appellate court to decide, in an exercise of its discretion, whether to impose costs even when the party seeking costs establishes that they are the “substantially prevailing party” on review. Nolan, 141 Wn.2d at 628.

Should the State substantially prevail in Buth’s case, this Court should exercise its discretion and decline to award any appellate costs that the State may request. First, Buth owns no property or assets, has no savings, and has no job and no income. (14CP 123-24; 15CP 58-59) Buth will be incarcerated for the next 10 years. (14CP 34-35; 15CP 99) And, finding that Buth was indigent, the trial court declined to order any non-discretionary LFOs at sentencing in this case. (01/22/16 RP 8-9; 14CP 33-35; 15CP 97-99) Thus, there was no evidence below, and no evidence on appeal, that Buth has or will have the ability to repay additional appellate costs.

Furthermore, the trial court found that Buth is indigent and entitled to appellate review at public expense. (14CP 62-64; 15CP 127-29) This Court should therefore presume that he remains indigent because the Rules of Appellate Procedure establish a

presumption of continued indigency throughout review:

A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefits of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

In State v. Sinclair, Division 1 declined to impose appellate costs on a defendant who had previously been found indigent, noting:

The procedure for obtaining an order of indigency is set forth in RAP Title 15, and the determination is entrusted to the trial court judge, whose finding of indigency we will respect unless we are shown good cause not to do so. Here, the trial court made findings that support the order of indigency.... We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. ... We therefore presume Sinclair remains indigent.

192 Wn. App. 380, 393, 367 P.3d 612 (2016). Similarly, there has been no evidence presented to this Court, and no finding by the trial court, that Buth's financial situation has improved or is likely to improve. Buth is presumably still indigent, and this Court should decline to impose any appellate costs that the State may request.

## V. CONCLUSION

"[F]ailure to comply fully with CrR 4.2 requires that the defendant's guilty plea be set aside and his case remanded so that he may plead anew." Wood v. Morris, 87 Wn.2d 501, 511, 554 P.2d 1032 (1976). The trial court here failed to comply with CrR 4.2 or with due process standards because it did not ensure that Buth understood the full nature of the charges or the facts necessary to prove those charges. Buth's convictions should be vacated and his case remanded to the trial court for a new plea hearing. This court should also decline any future request to impose appellate costs.

DATED: June 27, 2016



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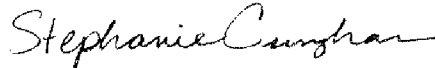
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### CERTIFICATE OF MAILING

I certify that on 06/27/2016, I caused to be placed in the mails of the United States, first class postage pre-paid, a copy of this document addressed to: Van Damme Alex Buth # 374831, Coyote Ridge Corrections Center, P.O. Box 769, Connell, WA 99326-0769.



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STEPHANIE C. CUNNINGHAM, WSBA #26436

# CUNNINGHAM LAW OFFICE

**June 27, 2016 - 12:17 PM**

## Transmittal Letter

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